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Aggrieved Purchasers Beware: Only Sellers Have Standing To Contest Denial Of Exemption From Massachusetts Sales Tax

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In late January, the Massachusetts Appellate Tax Board (“ATB”) issued another puzzling ruling declaring that a purchaser of electricity did not have standing to assert an exemption from sales tax on the electricity. The ruling was puzzling not because it tackled some new and complex area of law or overruled some previous line of precedent, but rather because it perpetuated a forty-year line of Massachusetts cases and rulings that just do not make sense in the opinion of the United States Supreme Court (as discussed below).

In *One Boston Place LLC v. Commissioner of Revenue*, Docket No. C277094 (January 17, 2007), the ATB confirmed a line of rulings denying a purchaser’s standing to challenge the denial of its exemption from the sales tax. The board held that since under Massachusetts law the legal incidence of the tax falls upon the vendor, and not the purchaser, only the vendor could be the “person aggrieved” by the assessment of the tax. Thus the purchaser, although likely out of pocket because of its statutory obligation to reimburse the vendor for sales taxes paid on its behalf,¹ did not have standing to apply for abatement of the tax (or appeal its denial) because it was not the “person aggrieved,” a necessary condition imposed by Mass. Gen Laws ch. 62C, § 37.

One Boston Place LLC (“One Boston”) was a single-member limited liability company owned by One Boston Place Real Estate Investment Trust. One Boston purchased electricity from Boston Edison Company (“Edison”), a vendor of electricity. One Boston had taken the position that it was exempt from sales tax under a “small business energy exemption” found within the Massachusetts General Laws, and requested Edison to file an abatement application so that Edison would not be obligated to collect sales tax on One Boston’s purchases of electricity. When the Tax Commissioner denied Edison’s abatement application, Edison began billing One Boston for sales tax, and One Boston attempted to appeal the Commissioner’s denial of abatement to the ATB.

Who is Aggrieved in Massachusetts?

The ATB did not get as far as addressing the issue of whether One Boston was eligible for the small business energy exemption, because it first had to contend with a line of

¹ Mass. Gen. Laws ch. 64H, § 3.

rulings and cases that held, essentially, that One Boston did not have standing to appeal the denial of Edison’s abatement. The road to apply for an abatement and to appeal the denial of an abatement in Massachusetts has been clear for some 40 years—maybe not right, but clear. The ATB followed a long line of cases, first beginning with the Massachusetts Supreme Judicial Court’s ruling in *First Agricultural National Bank v. State Tax Commissioner*,² that stated even though the vendor had the obligation to add the sales tax to the purchase price of the goods, and to enforce the reimbursement as a debt,³ the legal *incidence* of the sales tax was upon the vendor, not the purchaser.

The ATB examined subsequent cases that flesh out the concept introduced in *First Agricultural*, connecting the statutory dots between the “person aggrieved” and the vendor. In *J&B Leasing Co. v. Commissioner of Revenue*,⁴ the ATB had ruled “‘the person aggrieved’ is the person assessed.” And since it was clear under the statutes that the sales tax is imposed upon sales of tangible personal property “by any vendor,” and that such sales tax “shall be paid by the vendor,”⁵ it was equally clear that only the vendor has standing to apply for an abatement on the basis of a purchaser’s exemption, and only the vendor had standing to appeal the denial of the abatement.⁶

Can a Purchaser Get a Refund in Massachusetts?

Perhaps this case is not that interesting—it states nothing new regarding Massachusetts law or the interpretation thereof. But the concept of requiring two parties—one with the exemption and one with standing—to assert the exemption, is interesting, at least from a state taxing authority’s perspective. It may be argued that states have a legitimate policy of administrative efficiency underlying a rule prohibiting purchasers from initiating actions against the taxing authority. For example, if a supermarket were to inadvertently collect more than the statutorily required sales tax on purchases from consumers, lack of such a policy could open the door to a multitude of suits against the taxing authority because of the acts of a vendor. But this policy would seem to be less compelling in the context of an assertion of statutory exemption from a tax. It may also be argued that a state could more easily keep the coffers filled if it could create a system that requires two parties, whose interests may not be aligned, to work together in order to obtain a refund of sales taxes.

So how *can* an exempt purchaser obtain a sales tax abatement? One citation within *One Boston Place LLC* provides the answer. The ATB cites to *Mobil Oil Corp. v.*

² 229 N.E.2d 245 (Mass. 1967).

³ Mass. Gen. Laws ch. 64H, § 3.

⁴ ATB 1985-228.

⁵ Mass. Gen. Laws ch. 64H, § 2.

⁶ See *Supreme Council of the Royal Arcanum v. State Tax Commission*, 260 N.E.2d 822 (Mass. 1970).

*Commissioner of Revenue*⁷ and describes the case as “purchaser, a petroleum processor, allowed to prosecute sales tax exemption claim before Board *pursuant to a power of attorney granted by vendor.*” (emphasis added) The *Mobil* opinion does not provide the dollar amounts at stake, but it is a safe assumption that a significant amount was in controversy, as Mobil sought a sales tax abatement for its purchase of electricity used to process 2 million gallons of base fuel per day. With such a significant tax liability, interests between purchaser and vendor can quickly become aligned.⁸ The record in *One Boston Place LLC*, on the other hand, may demonstrate what happens more frequently: the vendor may file an application for abatement on behalf of the purchaser, but beyond that point (when the costs and time involved increase), the vendor may leave the purchaser on his own.

What Does the U. S. Supreme Court Have to Say?

It is worth noting the subsequent history of *First Agricultural National Bank*, the Massachusetts case upon which the purchaser’s lack of standing is predicated. *First Agricultural National Bank* was appealed to the United States Supreme Court. The United States Supreme Court stated “[b]ecause the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court’s characterization of the tax,” and then went on to state, “It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser... There can be no doubt from the clear wording of the statute that the Massachusetts legislature intended that this sales tax be passed on to the purchaser.”⁹

Although the Supreme Court’s words and phrases like “indisputable,” “no doubt,” and “clear wording” are usually heeded by lower courts, the Massachusetts Supreme Judicial Court decided two years later to reinstate their view of the statute: “The [United States] Supreme Court held that the incidence of the tax was upon the purchaser. (citation omitted) We see no reason, however, for changing our conclusion on the incidence of sales tax in a situation where Federal immunity from state taxation is not involved.”¹⁰ It appears that the Massachusetts Supreme Judicial Court slipped through the same door the United States Supreme Court opened in order to determine the

⁷ ATB 2001-121. If it is any hint, the full case name is *Mobil Oil Corp., pursuant to Power of Attorney granted by Boston Edison Co. v. Commissioner of Revenue*.

⁸ The potential conflict between the parties is that the vendor may not have the incentive to devote the time and funds to pursuing the exemption claim on behalf of the purchaser. The vendor may choose to simply bill the purchaser, and if the amounts at stake are not enough, the purchaser may pay the bills. In the context of *Mobil*, however, if Mobil refuses to pay Edison, the amounts are significant enough that Edison is faced with one of two routes: assigning the taxpayer its cause of action against the state, or initiating a private action against its customer for reimbursement of taxes paid by Edison to the state (per Mass. Gen. Laws ch. 64H, § 3).

⁹ *First Agricultural*, 392 U.S. 339, 347-348 (U.S. 1968).

¹⁰ *Supreme Council of the Royal Arcanum*, 260 N.E.2d at 823.

controversy and restricted the wisdom of the nine to apply only to federally immune entities.¹¹

These decisions caution us to read state statutes governing administration and collection of taxes carefully, in order to determine if the “taxpayer” is the one who pays the tax or the one who collects the tax, or if the “person aggrieved” means something outside the realm of common understanding. While the “legal incidence” theory should not dictate the result in states that impose joint and several liability upon the vendor and purchaser for sales tax, tax practitioners know well that the best substantive arguments fall in the face of a procedural misstep.¹² ■

¹¹ If this scenario sounds familiar, Massachusetts was not the only state to disregard the U.S. Supreme Court’s opinion. The U.S. Supreme Court also overruled a California Court of Appeals ruling that the legal incidence of the sales tax fell only on the vendor. See *Diamond Nat’l Corp. v. State Bd. of Equalization*, 425 U.S. 268 (1976). Less than two years later, the California Court of Appeals limited the U.S. Supreme Court’s ruling to entities exempted by federal law from such state and local taxes. See *Xerox Corp. v. County of Orange*, 66 Cal. App. 3d 746 (Cal. Ct. App. 1977).

¹² See, for example, the Texas Sales Tax provisions: although the Texas Comptroller may proceed against either a vendor (Tex. Tax Code § 111.016) or consumer (Tex. Tax Code § 151.515) for unremitted/unpaid sales tax, a tax refund claim may be filed with the Comptroller only by the person who directly paid the tax to this state (Tex. Tax Code § 111.104).



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